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March 9, 2020

Hon. Ajit Pai
Chairman
Hon. Brendan Carr
Hon. Jessica Rosenworcel
Hon. Michael O’Rielly
Hon. Geoffrey Starks
Commissioners
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Dear Mr. Chairman and Commissioners:

RE: *Ex Parte* Letter
Imminent Loss of Four Radio Stations, and a Construction Permit,
Serving the St. Louis Market (the “Stations”)
MB Docket No. 19-156
Emergency Interim Relief Requested

Pursuant to 47 C.F.R. §1.1206, this letter reports on four meetings and two telephone conversations with Commission personnel, by MMTC Law Clerk Savraj Gill and myself, concerning the above-referenced matter:

- Meeting with Alexander Sanjenis, Esq., Legal Advisor to Chairman Ajit Pai, March 5, 2020
- Meeting with Joel Miller, Esq., Legal Advisor to Commissioner Michael O’Rielly, March 5, 2020
- Telephone call with Benjamin Arden, Esq., Legal Advisor to Commissioner Brendan Carr, March 5, 2020
- Meeting with Media Bureau leadership: Michelle Carey, Esq., Chief; Holly Saurer, Esq., Deputy Chief; Albert Schuldiner, Esq., Chief, Audio Division; Brendan Holland, Esq., Chief, Industry Analysis Division; Thomas Horan, Esq., Senior Legal Advisor; and Jamila-Bess Johnson, Esq., Legal Advisor
- Meeting with Diane Holland, Esq., Legal Advisor to Commissioner Geoffrey Starks, and Tyra Carroll, Law Clerk, Office of Commissioner Starks, March 5, 2020
- Telephone call with Kate Black, Esq., Legal Advisor to Commissioner Jessica Rosenworcel, March 6, 2020.

In the meetings and calls listed above, we made the following points (being careful not to address the merits of the hearing proceeding in MB Docket No. 19-156)¹:

1. We referenced our March 2, 2020 Letter to the Chairman and Commissioners (the “MMTC March 2 Letter”). All of those with whom we spoke had reviewed it.
2. We stated that our objective is to encourage the Commission to invite us to apply to assume responsibility for interim operation of the Stations, thereby rescuing them from an uncertain fate as the Commission considers what to do with the spectrum on a permanent basis. MMTC will not apply unless it is invited to do so.
3. If our concept were adopted, and we applied to operate the Stations on an interim basis, we would be accepting all of the responsibilities of an owner, and having all of the authority of an owner except the power to assign the licenses to a permanent operator.
4. Through an LMA, we would plan to engage a local St. Louis company, Roberts Radio Broadcasting, LLC (“Roberts”), to operate the stations day-to-day under our supervision.
5. Our broadcast subsidiary MMTC Broadcasting, LLC, and Roberts, have each owned several broadcast stations and have had unblemished broadcast records.² MMTC has used stations donated to it by other licensees to incubate new entrants. Roberts has studio space that is more than adequate to house the Stations. A Roberts subsidiary was the first minority owned tower company; thus, Roberts is confident that it will be able to arrange for tower leases with the current tower owners or, if that is not possible, to construct new towers or duplex with other AM operators.
6. We would study the market to determine what would be the program services best meeting the needs of the community. As the leading advocate for diversity and inclusion in the broadcast regulatory space, MMTC would ensure that its subsidiary, MMTC Broadcasting “would provide quality service in the public interest and would strictly comply with all Commission regulations.” MMTC March 2 Letter, p. 3.

¹ Shortly we will respond to the Enforcement Bureau’s March 5 Motion to Strike (“EB March 5 Motion”). We expressly confirm that we do not seek to participate in the hearing or to appeal the ALJ’s *Order of Dismissal*, FCC 20M-03 (released February 19, 2020) (“Dismissal Order”), or that we seek to deny Entertainment Media Trust (“EMT”) the right to appeal, or that Messrs. Watkins, Sanders and Romanik would be involved in the contemplated operations of the Stations and would derive any benefits of any kind from favorable action on MMTC’s concept. Finally, we confirm that seek only an invitation to apply for *interim*, not current or future permanent operation.

² Ten years ago, in the wake of the recession, Roberts Broadcasting (like many owners of secondary network-affiliated stations) underwent a Chapter 11 proceeding. It emerged routinely from that proceeding, having sold its television stations for fair market value. Roberts’ radio, tower, wireless, and hotel holdings have never been in bankruptcy. Roberts presently operates a financially successful commercial FM station, WRBJ-FM, Brandon (Jackson), Mississippi.

7. The heart of our concept is that Roberts, at MMTC's direction, would incubate potential new entrants at the Stations. In particular, Roberts would provide potential new entrants with an opportunity to shadow its managers and sales executives, thus learning their skill sets on the job. MMTC would also include these incubatees in its mentoring program, which is managed by MMTC Vice Chairman Erwin Krasnow.
8. This incubation would not be dependent upon the fate of the Incubator Program that the Commission adopted in 2018, only to have it struck down and remanded for additional proceedings in *Prometheus Radio Project v. FCC*, 939 F.3d 567, 587 (3d Cir. 2019) ("*Prometheus IV*"). The Commission's program, if revised and readopted, presumably would be designed to provide ownership rule relaxation as an incentive to help motivate established broadcast companies to set up their own incubators. MMTC would not seek that or any other incentive, however. Instead, MMTC's operation of the Stations as incubators would serve as proof-of-concept for how a future Commission incubation program could operate.
9. We noted that under the Commission's rules, the ALJ's Dismissal Order, terminating the proceeding and canceling the licenses, would become final imminently.³ Thus, if the Commission wants to have the Stations' service continue beyond the finality date, it will need to credential an interim operator promptly. One reason interim operation should be authorized is that it may take the Commission some time to decide what to do with the AM stations' spectrum. Presumably it would be auctioned, but AM auctions are time-consuming, difficult, and rare.
10. We believe that MMTC Broadcasting, LLC would be a superlative operator due to its long experience working with and incubating new entrants. MMTC also brings a great deal to the table through the wealth of expertise, training, and mentoring ability of its staff and the members of its boards of directors and advisors (see left hand column of page 1 of this letter).
11. At several of the meetings and conversations we had with Commission staff March 5-6, we were asked whether the Commission should entertain multiple applications to be an interim operator. While we do not think that is required, we would not object if others were invited to apply, and if the Commission decides to invite other potential applicants, it should reach out to minority-owned entities and should encourage all applicants to propose some form of incubation. Should someone else present an application that is superior to ours, they should be chosen and we would reach out to them to offer assistance.

³ The Bureau states that Section 1.302, rather than Section 1.117 of the Rules (with its contemplation of action on the Commission's own motion until Day 40 from a final order) applies. Thus, the "Drop Dead Date" for finality is March 20, not March 30. See EB March 5 Motion, pp. 4-5 n. 12.

12. A closely analogous case is the aftermath of the loss of license of Jackson, Mississippi's WLBT-TV, Channel 3, in 1969. In *UCC II*, the D.C. Circuit directed the Commission to come up with a plan for interim operation. *Office of Communication of the United Church of Christ*, 425 F.2d 543, 550, rehearing denied, 425 F.2d 551 (D.C. Cir. 1969). On remand, in *Lamar Life Broadcasting Co.*, 26 FCC2d 100 (1970), there were three applicants for interim operation, and the Commission went about selecting an interim operator without the need for a formal evidentiary hearing. *Id.* at 103. It selected Communications Improvement, Inc., which (like MMTC here)⁴ had specifically proposed to incubate new entrants. *Id.* at 109. Thereafter Communications Improvement, Inc. operated WLBT-TV for 11 years.
13. We are confident that 47 U.S.C. §309(j) does not preclude interim operation. Section 309(j), which sets out a mechanism for spectrum auctions, also spells out the circumstances under which the Commission can avoid mutual exclusivity. Section 309(j)(6)(E) states:
 - (6) Rules of construction. Nothing in this subsection, or in the use of competitive bidding, shall – (E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and *other means* in order to avoid mutual exclusivity in application and licensing proceedings (emphasis supplied).

“Other means” are the key words in this provision. A policy goal that qualified as an “other means” would need to possess the degree of importance and scope as the other goals set out in the statute (engineering solutions, negotiation, threshold qualifications, and service regulations).
14. The following three attributes of the type of interim operation contemplated by MMTC would each qualify as an “other means” under Section 309(j)(6)(E):
 - (1) *Preserving Service*: saving four radio stations and a CP in a sizeable and diverse market;⁵
 - (2) *Test of Incubation*: a live trial, on the ground, of the incubation concept, with the sponsoring broadcasters being highly experienced;⁶ and

⁴ MMTC is profoundly grateful to former FCC General Counsel Henry Geller and the late United Church of Christ *pro bono* attorney Earle K. Moore for coming up with this plan. Mr. Geller (who just turned 96) is tracking the instant case with us. The Geller/Moore plan is the model for what MMTC proposes here.

⁵ St. Louis is the nation's 24th market, with a population of 2,774,000 (2020), 25.7% of which is people of color. See BIA, Investing in Radio (2019).

⁶ Such a test might help inform the rulemaking the Commission will hold in response to the *Prometheus IV* remand of its 2018 Incubation Program.

(3) *Ownership Diversity*: a rare opportunity to promote ownership diversity and, thus, respond to the concerns of lawmakers⁷ (and the *Prometheus IV* Court) who correctly maintain that the Commission has not consistently been attentive to the need to promote racial and gender diversity in broadcast ownership.

15. Adding to our confidence that these three factors qualify as “other means” to avoid mutual exclusivity is the history underlying the Tax Certificate Policy. Beginning in 1954, tax certificates under 26 U.S.C. §1071 were issued attendant to compulsory, and later voluntary, divestitures that de-consolidated local media, such as the breakup of a newspaper/broadcast crossownership. *See Issuance of Tax Certificates*, 19 RR2d 1831 (1970). Certificates could be issued “[i]f the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations[.]” 26 U.S.C. §1071(a). In 1978, the Commission determined that promoting minority ownership was of an equivalent degree of importance as the structural “ownership and control” issues contemplated by Congress in adopting Section 1071. *See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC2d 979, 981 (1978). Today, as in 1978, advancing minority ownership should be regarded as a high enough priority to justify creative, “win-win” relief such as we are proposing here.
16. In our March 5 meeting with Media Bureau staff, we were asked whether we contemplated a policy on interim operations, with incubation, that would apply not just to revoked licenses, but also to the significant and growing number of stations whose owners *voluntarily* turn in the stations’ licenses. This is an excellent idea, and we enthusiastically agree. **Henceforth we will refer to the relief we seek as a proposed “License Cancellation Policy.”**

It is easy to find reasons *not* to consider new policies fostering minority and women’s broadcast ownership, and it can be challenging to create new diversity policies. For decades, the Commission has ignored, sat on, or found thin reasons to reject dozens of such ideas advanced by MMTC and others that were trying to help the Commission satisfy its statutory and moral obligation to facilitate ownership diversity.⁸

⁷ A wave of proposed legislation would profoundly enhance minority and women’s broadcast ownership prospects, including among others HR 3957, Expanding Broadcast Ownership Opportunities Act, Rep. Butterfield, which would create a tax advantage for selling broadcast priorities to diverse owners;

HR 5567, the MEDIA Diversity Act, Rep. Long and Rep. Veasey, Measuring the Economics Driving Investments and Access for Diversity Act – requires the FCC when considering the state of competition to consider market barriers for socially disadvantaged individuals; and H Res 549, Media Diversity Resolution, Rep. Demings, and S Res 306, Sen. Rubio and Sen. Rosen – reaffirming Congress’ commitment to increasing media diversity and to working with industry to find solutions.

⁸ *See, e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372, 421 n. 59 (3d Cir. 2004) (“*Prometheus I*”) and *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 n. 11 (3d Cir. 2016) (“*Prometheus III*”) (holding that the Commission must consider several non-controversial, race-neutral proposals that civil rights organizations placed before it in media structural ownership proceedings).

Fortunately, the Commission has the authority to use the occasion of the MMTC concept to adopt a new policy promoting interim operation with incubation. Indeed the case law suggests that the Commission, while not required to avoid mutual exclusivity, is authorized to do so and is to be afforded broad discretion in choosing the methods and participants.⁹

We respectfully encourage the Commission to act promptly on MMTC's concept for interim operation. Further, we stand ready to engage collaboratively with Commission staff in framing a general “**License Cancellation Policy**” that would foster the conversion of stations into incubators rather than having their licenses canceled.

⁹ See, e.g., *NTCH, Inc. v. FCC*, 220 WESTLAW 855465, ___ F.3d ___ Headnote 3 (D.C. Cir. 2020) ((noting that the Court will afford the greatest deference to FCC's innovative technical judgments designed to exploit spectrum when supported with even modicum of reasoned analysis); *La Star Cellular Tel. Co. v. FCC*, 899 F.2d 1233, 1235 (D.C. Cir. 1990) (finding the FCC's decision to award one applicant sole interim operating authority justified after the agency adequately balanced the need for uninterrupted service against potential prejudice to the competing applicant and considered problems with suggested other options of joint-operation or third-party operation); *Damsky v. FCC*, 199 F.3d 527, 535 (D.C. Cir. 2000) (noting that the Court will afford deference to the FCC's interpretation of its own rules and policies unless they are plainly erroneous or inconsistent with the regulations); and *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000) (holding that the FCC's statutory duty to avoid mutual exclusivity in application and license proceedings did not preclude the agency from adopting a new geographic licensing scheme found to be in the public interest).

Hon. Ajit Pai and Commissioners

March 9, 2020

Page Seven.

Respectfully submitted,

David Honig

David Honig

President Emeritus and Senior Advisor, MMTC

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